93-816

No. _____

Supreme Court, U.S.
FILED
OCT 22 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

BENNIE DEAN HERRING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

BENNIE DEAN HERRING
Proceeding Pro Se
Rt. 2 Box 232
Brundidge, Alabama 36010
(205) 762-2420

---

55 pp

QUESTIONS PRESENTED

I. WHETHER THE EQUAL PROTECTION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION EXTEND TO INDIVIDUALS OTHER THAN MEMBERS OF A PARTICULAR RACE OR RELIGION.

A. WAS THE PETITIONER'S EVIDENCE SUFFICIENT TO ENTITLE HIM AN EVIDENTIARY HEARING IN THE DISTRICT COURT?

II. WHETHER THE EXEMPTION CLAUSE (SUBSECTION b) OF TITLE 47 SECTION 605 PROVIDE A DEFENSE TO AN INDIVIDUAL CHARGED WITH AIDING OR ASSISTING A PERSON IN THE UNAUTHORIZED DECRYPTION OF PROGRAMMING DELIVERED BY SATELLITE.

A. SHOULD AN EXPERT WITNESS, WHO WOULD TESTIFY TO THE NON-EXISTENCE OF A MARKETING SYSTEM, AS CONTEMPLATED UNDER TITLE 47 SEC 605(b), BE DISALLOWED?

B. DOES AN ARTIFICIAL PRICING ARRANGEMENT BETWEEN THE PROGRAMMERS CREATE A DEFENSE UNDER SUBSECTION (b)?

III. WHETHER TITLE 47 SEC 605 IS UNCONSTITUTIONALLY VAGUE AS IT APPLIES TO BACKYARD SATELLITE RECEPTION.

A. DOES AN INDIVIDUAL HAVE THE RIGHT TO MONITOR A WIDERANGE BROADCAST SIGNAL?

B. DOES TITLE 47 SEC 605(a) EVEN ATTEMPT TO CRIMINALIZE THE MERE UNAUTHORIZED RECEPTION, FOR PRIVATE USE, OF A RADIO SIGNAL?

C. DOES TITLE 47 SEC 605(e)(4) UNCONSTITUTIONALLY RELATE UNAUTHORIZED DECRYPTION WITH THE UNLAWFUL DIVULGENCE OF A RADIO SIGNAL?

LIST OF INTERESTED PARTIES

Trial Judge: The Honorable Myron Thompson
United States Distrcit Judge
Middle District of Alabama
Federal Courthouse
15 Lee Street
Montgomery, Alabama 36104

Petitioner: Bennie D. Herring
Rt. 2 Box 232
Brundidge, Alabama 36010

Appellees: United States Government

COUNSEL FOR RESPONDANTS: James E. Wilson
United States Attorney
Middle District of Alabama
P.O. Box 197
Montgomery, Alabama 36107

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED.....i

LIST OF INTERESTED PARTIES.....iii

TABLE OF CONTENTS.....iv

TABLE OF AUTHORITIES.....v

STATUTORY AUTHORITIES.....v

OPINIONS AND ORDERS BELOW.....1

JURISDICTIONAL STATEMENT.....2

CONSTITUTIONAL PROVISION INVOLVED.....2

STATEMENT OF THE CASE.....3

ARGUMENT.....5

CONCLUSION.....

CERTIFICATE OF SERVICE.....

APPENDIX.....

TABLE OF AUTHORITIES

CASE PAGE NO.

Air Capital Cablevision, Inc.
vs. Starlink Communications Group,
Inc.,601 F.Supp. 1568
(D. Kan. 1985).....10,11,13

David Allen Wayte v. U.S. 105
Supreme Court Reporter 524.....6,7

Tyler v. Berodt, 877 Fd. 2d 705(1989)...19

U.S. v. Gordon, 817 F.2d 1538,
(11th Circuit 1987).....5,6,9

STATUTORY AUTHORITIES

Federal Rules of Evidence
702,703,704.....14

Title 47 Sec. 605.....10,17,19

IN THE SUPREME COURT OF THE UNITED STATES

BENNIE D. HERRING,

Petitioner,

VS.

United States of America,

Respondant.

OPINIONS AND ORDERS BELOW

APP-1 Order, of District Court, denying petitioner's right to evidentiary hearing on the issue of selective prosecution;

APP-2 Order, of District Court, allowing release pending appeal;

APP-3 Order, of Appelate Court, affirming judgement;

APP-4 Order, of Appelate Court, denying enbanc consideration.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. 1254 (1). The order of the Eleventh Circuit Court of appeals denying the petitioner's motion for Rehearing En Banc is dated July 30, 1993.

CONSTITUTIONAL PROVISION INVOLVED

THE ACTION OF THE DISTRICT COURT, DENYING THE PETITIONER A DEFENSE UNDER THE EXEMPTION CLAUSE, AND SANCTION OF THAT ACTION BY THE APPELLATE COURT VIOLATED THE PETITIONERS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT. ALSO, THE ISSUES OF BACKYARD SATELLITE RECEPTION,INVOLVED IN THIS CASE, ARE BEFORE THIS COURT FOR THE FIRST TIME.

STATEMENT OF THE CASE

To defend himself of criminal charges under Title 47 Sec 605(e)(4), the petitioner attempted a defense based on; (1) that he was being singled out for prosecution because of anti-cable actions he undertook in response to the scrambling of satellite delivered programming;(2) that the backyard dishowner (including anyone aiding and assisting the backyard dish owner) was exempt from criminal and civil prosecutions under Sec. 605 until the cable companies/programmers met certain conditions outlined under Title 47 Sec 47 605(b); (3) that the 1989 amendment((e)(4)) was unconstitutional in that it related "unauthorized decryption" with receiving and divulging radio signal.

In a pretrial hearing, the petitioner attempted to introduce evidence to support his prima facia case of selective prosecution. The evidence was put before

the District Court in a manner consistent with the procedures established by the 11th Circuit Court of Appeals in other similar cases. The District Court refused to hear the evidence and the Appelate Court affirmed that decision without comment.(App-1)

During the trial of the case the petitioner introduced an expert witness to aid the jury in understanding the undefined term "unauthorized decryption". The expert witness was not allowed to testify even though the government's expert was allowed to testify as to the term "unauthorized decryption". The petitioner's expert testimony as to the marketing system , outlined in subsection(b) of Title 47 Sec 605 , was also not allowed even though the government's testimony, on the same issue, was allowed.

The 11th Circuit Court of Appeals affirmed the District Court's decision without comment even though all the

arguments pro and con were before that court for the first time. Never had there been a Title 47 Sec 605(e)(4) case before that court or any other appelate court. The only court ever to address subsection (b) of this statue was a Kansas court in 1985. That court's understanding of the exemption clause is consistent with the petitioner's and not so with the 11th Circuit.

ARGUMENT

I.

THE EQUAL PROTECTION CLAUSE EXTENDS TO ANY PERSON SELECTED FROM ANY GROUP AND PROSECUTED.

A. The petitioner was precluded from proving selective purpose when the District Court refused to allow testimony from witnesses.

In U.S. vs. Gordon, 817 F 2d 1538, 1539, the 11th Circuit Court of Appeals established a two prong test for a defendant before he would be allowed the defense of

selective prosecution. The first prong requires a defendant to establish he has been singled out for prosecution while others similarly situated have not. The second prong requires the decision be invidious or in bad faith. In David Allen Wayte vs. U.S. 105 Supreme Court Reporter 1524, this Court further specified the elements required before an individual could claim selective prosecution as a defense. This Court recognized the terms "effect" and "purpose". It decided that, even if there was a discriminatory effect, there must also be a discriminatory purpose. In the case at bar, using Gordon as a pattern, the petitioner subpoenaed several witnesses to a pretrial hearing in the District Court. The petitioner also filed several affidavits to be used as evidence at that hearing. These affidavits and witnesses would have produced evidence of the government prosecuting the petitioner while not prosecuting people it

knew were similarly situated. In fact, the petitioner didn't need witnesses to prove the first prong established by the eleventh circuit in Gordon. The prosecuting attorney stated in open court:(1SR-Pg. 16,17)

> "Well, he understands fully why he got selected to prosecute: because he was the person who was selling more of the modifications and selling more of these descramblers than probably anyone else in this district. And that is a proper and appropriate reason for singling him out as one to be prosecuted as opposed to others; in the interest of utilization of resources and so forth in the prosecution of criminal violations."

This court touched on "utilization of resources" in Wayte. It did not require the government to search through 674,000 non-registrants. However, the government did prosecute people who reported themselves

or were reported by others. Nowhere in that opinion did it allow private industry to make the decision as to who would be prosecuted and who would not. Whether the petitioner was a draft dodger, a satellite dealer, or a black Christian voter registrant makes no difference. When a person is selected from any group of similarly situated people and prosecuted he deserves a chance to prove any possible discriminatory purpose of the prosecutor. The prosecutor's statement alone extablished a prima facia case.

In his order denying the motion for an evidentiary hearing, the District Judge ruled: App-1

> In order to merit an evidentiary hearing on a claim of selective prosecution, a criminal defendant must establish, among other things, that the decision to prosecute was based on an invidious classification such as

race or religion."

The District Court went on to rule: App-1

> "Even if Herring is correct in arguing that the government had "no rational basis" to prosecute him and not others similarly situated, he has failed to show that he was singled out for any invidious or otherwise impermissible reason."

The petitioner's witnesses and affidavits would have furnished evidence to the Court that the government prosecuted the petitioner at the direction of private industry and allowed similarly situated people to go unprosecuted at the direction of private industry. When the court refused to hear the witnesses it precluded the petitioner from establishing the second prong set out in Gordon. The petitioner asks this Court to determine if such acts constitute impermissible reasons and proof of selective purpose.

II

THE EXEMPTION CLAUSE OF TITLE 47 SEC. 605 (SUBSECTION b) EXEMPT THE BACKYARD DISH OWNER (INCLUDING ANYONE WHO AIDS OR ASSISTS) FROM PROSECUTION UNDER SECTION 605 UNTIL A GOOD FAITH MARKETING SYSTEM IS ESTABLISHED.

In Air Capital Cablevision, Inc. v. Starlink Communications Group, Inc., 601 F.Supp. 1568 (D. Kansas 1985) a Kansas court stated:

> "The legislative history of the cable act makes it clear that in the absence of encrypted programming or an established marketing system, the manufacture, sale, or distribution of earth satellite stations, satellite dishes, does not violate the act."

Title 47 section 605 was amended in 1984 because people were actually being prosecuted for selling and buying satellite backyard systems. The 1984 amendment

exempted those systems from prosecutions under section 605 until such time as the suppliers of programming encrypted their signal and established a good faith marketing system to market that programming to the backyard dish owner. In the Air Capital case the District Court acknowledged the requirement of encryption and a marketing system.

In the instant case, the petitioner attempted to use the 1984 amendment as a defense. The District Court refused to allow it. That refusal was based in part by a total misunderstanding of the statute by the court and the government's lawyer. In an exchange, between the court, the prosecutor and the petitioner, the court issued this ruling:(R-4-Pg. 149)

> Mr. Niven: He's still misinterpreting subsection b, your honor. Subsection b is

for unencrypted, and even the unencrypted programs could be--it would be unlawful to intercept unencrypted programming if a marketing system is set up for unencrypted programs.

The court: That's right. They don't have to encrypt. But that's it, that's my ruling. Let's move on to something else.

Subsection (b) clearly states the signal must be encrypted. The government in its brief before the district court used even a different interpretation. The government argued:

> "It is clear from the plain language of the statute and the legislative history that the exception only applies to the interception of

unencrypted satellite cable programming."

The 1984 amendment plainly states that the programming must be encrypted and there must be a marketing system established with lawfully designated agents. The District Court determined, there must be either an encryption or a marketing system. The Air Captital court determined there must be both. The District Court misconstrued the 1984 amendment and forced the petitioner to defend himself without the benefit of that amendment. Had the petitioner been allowed to challenge the existence of a marketing system pursuant to the 1984 amendment, the outcome of his second trial might have been different. The petitioner was at least entitled to a defense under that statute. The Air Capital case and the instant case are the only two cases, to this petitioner's knowledge, involving the exemption clause (subsection b). This District Court's opinion that "they don't have to encrypt"

and the opinion in the Air Capital case are in direct conflict and worthy of review by this Court. The Court of Appeals chose not to address the issue.

II

A. AN EXPERT WITNESS, WHO WOULD TESTIFY TO THE NON-EXISTENCE OF A MARKETING SYSTEM, AS CONTEMPLATED UNDER TITLE 47 SEC 605(b), SHOULD BE ALLOWED.

Rule 702 of the Federal Rules of Evidence allows testimony by experts if that testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; a witness may be qualified as an expert by knowledge, skill, experience, training, or education. Rule 703 allows this expert to base his opinion on facts or data, in a particular case, on those perceived by or made known to the expert at or before the hearing. Rule 704 allows an expert to give testimony on the ultimate issue to be decided by the trier of the

fact. The petitioner in this case attempted to use the Honorable Barry Teague as an expert to help the jury determine if a device is authorized or unauthorized and if a person is exempt, pursuant subsection (b) (the exemption clause) to receive a satellite delivered signal with a backyard dish or any related equipment.

Mr. Teague, an attorney and an ex-U.S. attorney, was more knowledgeable about satellite signal legislation and application than any other specially trained person in the Southeast. He had been studying and following the changes in satellite related law since 1987. The term "unauthorized" is not statutorally defined and whether or not a device is capable of unauthorized decryption was the ultimate issue to be decided by the trier of the fact. The petitioner was being charged with selling a device that facilitated unauthorized decryption (aiding and assisting). To

disallow expert testimony on the ultimate issue was a violation of the petitioner's basic rights. Mr. Teague's testimony was based in part on a report introduced to the court.

At the November 7, 1990 hearing, the petitioner introduced a report by the Rural Electrification Association (REA). That report was filed with the Federal Communications Commission (FCC) in March, 1990. A part of that report tells of the cable industry's refusal to put forth a good faith marketing system and the effects of that refusal. Their report stated:

> "The home satellite dish market is not working, high prices, blocked access to programming and other artificial market place distortions caused by the cable industry have fostered rampant signal piracy and threatened to destroy the home dish industry."

The market system referred to in section

605(b)(1)(2) is the same market that is referred to in this report before the FCC. The very purpose of subsection (b) was to require the cable industry to put forth a good faith marketing system. The cable industry owns all major programmers and over 85% of all programmers.

III

TITLE 47 SEC 605(e)(4) IS UNCONSTITUTIONALY VAGUE AS IT APPLIES TO BACKYARD SATELLITE RECEPTION.

Subsection (a) of this title does not attempt to criminalize the reception of a radio signal. It criminalizes the divulgence or retransmission without proper authority. Subsection (e)(4) uses the term "or is intended for any other activity prohibited by subsection (a)" as if the unauthourized decryption of satellite cable programming is prohibited by subsection (a). It attempts to relate "unauthorized decryption" with "unauthorized divulgence".

Title 47 Sec. 605 has never criminalized the reception of a wide range broadcast signal.

In an attempt to balance the rights of satellite programmers and the rights of individuals who want to receive the satellite delivered programming, Congress amended section 605 in 1984. This amendment is sub-section(b). This sub-section states in part: "the provision of sub-section (a) shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sell) of such interception or receipt, of any satellite cable programming for private veiwing if the programming is not encrypted and a marketing system is not established under which an agent or agents have been lawfully designated for the purpose of authorizing private veiwing by individuals".

While it is clear that Congress intended to solve the problem of programming delivered to the backyard dish owner, it

failed miserably to indicate a clear concise course for the public to follow. Because of extreme special interest pressure applied to the legislators and becaue of the same pressure being applied to non-legislative committees that are charged with putting into print the final version of new legislation, the outcome of section 605(E)(4) is another attempt to dodge a constitutional issue in the delivery of satellite TV programming. The real issue is whether or not a person has the right to monitor, for his own benefit, the air ways. The Supreme Court recently ruled that if you say something into the open air ways, you have no reasonable expectation of privacy even though your voice is transmitted by a hand held cordless telephone, Tyler v. Berodt, 877 F.2d 705 (1989). Anyone wanting to monitor a conversation held over a cordless telephone, without the authorization of the sender, would

necessarily have to have some kind of a device since any form of electronic communication is unitelligible to the naked ear. A voice or electronic signal transmitted into the air ways by a cordless hand held telephone becomes am omni directional electronic signal, the same as a broadcast transmission from a satellite 22,500 miles above the equator. To monitor an omni directional electronic signal from a cordless telephone, a person would use a device (a modified scanner). To monitor an omni directional electronic signal broadcast from satellite, a person must have a device (a modified General Instrument Videocypher II descrambler). Any distinction would be in the equipment not the type of signal. Both signals penetrate the air space of the individual and neither signal is retransmitted or the contents of such signal divulged.

Enforcement of 605(E)(4) is not about

satellite descramblers or hand held telephones. The enforcement of 605(E)(4) is a direct attempt to change constitutional law in favor of the cable companies. Enforcement of 605(E)(4) takes away the right of a private person to monitor the air ways. By relating "unauthorized decryption" with unauthorized divulgence subsection (e)(4) exceeds the limitations placed on an individual by subsection (a), in that it criminalized the reception of a signal. The decryption of a signal is nothing more than one step in the reception of it. It has nothing to do with retransmission or divulgence which is criminalized by Sec. 605. By prosecuting individuals under sub-section(e)(4) the government is circumventing the exemption clause (sub-section(b)). Even then, private use is excluded until there is an encryption and a marketing system.

Assuming reception does occur then the

communication must not be used for a person's own benefit or for the benefit of another not entitled thereto. Benefit within the context of section 605 requires the using of a communication for financial gain. In 1984, section 605 was amended to exclude private use.

"The term private financial gain shall not inlude the gain resulting to an individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use". Section 605 (d)(5). Section 605 plainly states that if the communication is used privately in ones own home then it is excluded. No one ever accused the petitioner of selling a device other than one used within the private dwelling by an individual. If it is not a crime to use the signal in ones own home, then a device to capture such signal cannot be in violation

of federal law. If Congress had wanted to criminalize the private reception of broadcast signal, it could have simply used the wording:

> "No person not being entitled thereto shall receive or assist in receiving any electronic signal without the authorization of the sender".

While the government has alleged that the defendant is selling decoders, they have made no allegations that the defendant was selling satellite cable programming. Further, the government has presented no evidence that the defendant has re-broadcast, distributed, or divulged a specific communication. The government contends that the alleged sale of the modified decoder by the defendant constitutes assistance in the unauthorized receipt and use of a communication for the benefit of another not entitled thereto.

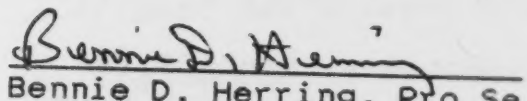
Title 47 Sec. 605 does not criminalize "unauthorized receipt". That term is not used.

CONCLUSION

The petitioner contends his prosecution was a result of his opposition to the current scrambling system employed by the cable companies/programmers. The District Court's failure to allow an evidentiary hearing for Herring to bring out those facts was a denial of his equal protection rights. The District Court denied Herring an evidentiary hearing because he did not allege his prosecution was based on race or religion. The petitioner was denied the right to use the exemption clause under section 605 because the Court misconstrued the law. The misconstruction of law by the District Court was caused by the vagueness of the statue and amendments there to. This appeal of a

conviction under Title 47 section 605(e)(4) is a case of first impression in this country.

Wherefore, this petitioner begs this Honorable Court to review his appeal and give his arguments the same consideration as would be given any other individual, whether or not he is represented by counsel.



Bennie D. Herring, Pro Se
Rt. 2 Box 232
Brundidge, Alabama 36010
205-762-2420

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	¦	
	¦	
V.	¦	CR. NO. 90-252-S
	¦	
BENNIE DEAN HERRING	¦	

ORDER

A federal grand jury has indicted defendant Bennie Dean Herring on two counts of assisting in the unauthorized decryption of satellite cable programming in violation of 47 U.S.C.A. Sec.605(e)(4).(1) The indictment specifically charges that Herring illegally modified and distributed devices designed to "descramble" satellite television signals transmitted from cable programmers to subscribers. Herring has moved to dismiss the indictment on a variety of grounds. For the reasons that follow, the court concludes that his motion is due to be denied.

I. Selective Prosecution

Herring contends that the government has singled him out for prosecution while failing to prosecute other persons who, the

---

1. This portion of the statute provides, in relevant part, that,

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic or mechanical, or other deivice or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming ... shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both.

Sec. 605(e)(4)

government is aware, possess and use the same kinds of "descrambler" devices as

Herring. He requests an evidentiary hearing in order to present proof in support of this claim of selective prosecution, a criminal defendant must establish, among other thing, that the decision to prosecute was based on an invidious classification such as race or religion. Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531 (1985); United States v. Gordon, 817 F.2d 1538, 1539 (11th Cir. 1987) (per curiam), vacated in part on other grounds, 836 F.2d 1312 (11th Cir. 1988). Even if Herring is correct in arguing that the government had "no rational basis" to prosecute him and not others similarly situated, he has failed to show that he was singled for any invidious or otherwise impermissible reason. Therefore, his selective prosecution claim lacks merit.

II. Lack of a "Marketing System"

Herring also claims that the indictment should be dismissed because Sec. 605, by its

own terms, cannot be enforced unless and until a "marketing system" is established under which "an agent...has been lawfully designated for the purpose of authorizing private viewing by individuals." Sec. 605(b)(2). However, among other flaws in this arguement, Herring ignores the fact that the marketing system excetion of Sec. 605 (b)(2) applies only if, in addition, "the programming involved is not encrypted." 47 U.S.C.A. Sec. 605(b)(1). Herring does not--nor could he logically--contend that the decrpytion

devices he is charged with modifying and distributing were intended to receive unencrypted programming. In any event, the government contends that a markeing system has been established.

III. No Legal Evidence in Support of Indictment

Herring has also moved to dismiss the indictment on the ground that there was no legal evidence before the grand jury that he had violated Sec. 605(e)(4). However, an indictment valid on its face may not be challenged on the basis of inadequate ividence. United states v. Calandra, 414 U.S. 338, 345, 94 S.Ct. 613, 618 (1974); United States v. Hyder, 732 F2d 841, 845 (11th Cir. 1984). See also Midland Asphalt Corp. v. United States, ___ U.S. ___, 109 S.Ct. 1494, 1499-1500 (1989) ("only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried").

IV. Indictment's Lack of Specificity

Herring claims that the indictment does

not contain a plain, concise statement of the facts constituting the crimes he is charged with committing.(2) The indictment in this case sets out the approximate dates and places of the offenses, specifies / describes the "descrambler" devices that Herring used and shat he did with them, and contains all the elements of a violation of Sec.

---

2. Herring has not requested a bill of particulars.

605(e)(4).(3) The indictment is sufficient to inform Herring of the charge against which he must defend, under both the sixth amendment to the United States Constitution, see United States v. Ramos, 666 F.2d 469, 474 (11th Cir. 1982), and Fed. R. Crim. P. 7(c)(1).

V. Right to Privacy

Herring suggests that Sec. 605(e)(4) is unconstitutional both on its face and as applied to him in this criminal prosecution because it violates his right to monitor satellite signals that travel throught the public airwaves.(4) Herring relies on the Eight circuit's decision in Tyler v. Berodt, 877 F2d 705 (8th Cir. 1989), cert. denied, ____ U.S. ___, 110 S.Ct. 723 (1990), holding that private citizens do not have a "justifiable expectation of privacy" in their cordless telephone conversations, sufficient to bring a civil action under 47 U.S.C.A. Sec. 605. Tyler says nothing about whether the government may proscribe the unauthorized decrytpion

---

3. Count I charges:

On or about the 11th day of May, 1990, in the Middle District of Alabama,

BENNIE DEAN HERRING did manufacture, assemble, modify, sell, and distribute an electronic, mechanical and other device, that is a General Instruments Videocipher descrambler, serial number P10500654 containing a modified circuit board with serial number A/O A032A7C2D, knowing, and having reason to know that the device is primarily of assistance in the unauthorized decryption of satellite cable programming, in violation of Title, 47, United States Code, Section 605(e)(4).

Count II refers to a "descrambler" with a different serial number which Herring allegedly used on a different date; otherwise, its language is identical to that of Count I.

Herring describes this right as a component of the constitutional right to privacy.

of satellite cable programming. Herring's proposition that his conduct is protected by a right to monitor the airwaves or any other kind of privacy right finds no support in Tyler or elsewhere.(5)

VI. Outrageous Government Conduct

According to Herring, the indictment in his case should be dismissed because the government has engaged in outrageous conduct by prosecuting him at the urging of, and in order to benefit, an illegal monopoly of satellite cable companies. Herring has presented no evidence of any connection between the government's prosecution of this case and any illegal acts on the part of cable companies; even if he had, this would not be sufficient to demonstrate government conduct so outrageous that it violates his right to due process. See Hampton v. United

States, 425 U.S. 484, 489-90, 96 S.Ct. 1646, 1649-50 (1976); United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643 (1974). Cf. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952).

VII. Sec. 605(e)(4) as Void for Vagueness

Finally, Herring asserts that the law shich he is charged with violating, Sec. 605(e)(4), is unconstitutional on its face because it is "indefinite" and "vague". However, there is no indication that

---

5. See also ON/TV of Chicago v. Julien, 763 F.2d 839, 843 (7th Cir. 1985) ("Sales of devices solely designed to intercept protected communications threaten the viability of the subscription television industry and there is no countervailing social or policy consideration that would justify these sales").

the statute sweeps within its reach any constitutionally protected conduct or that it draws an imprecise or uncertain line between permitted and illegal activity.(6) Section 605(e)(4) defines the offense Herring is accused of committing "with sufficient definite-ness that ordinary people can understand what conduct is prohibited," and "in what manner that does not encourage arbitrary and discriminatory enforcement." Kolendar v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983).

VIII. Conclusion

Accordingly, it is the ORDER, JUDGMENT, AND DECREE of the court, that the motion to dismiss the indictment, filed by defendant Bennie Dean Herring on October 26, 1990, be and it is hereby denied.

DONE, this the 14th day of November, 1990.

Myron Thompson

United States District Judge

---

6. The court also notes that the statute's applicability is limited by its knowledge requirement. See 47 U.S.C.A. Sec. 605(e)(4).

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	
vs.		CR. NO. 90-252-S
	:	
BENNIE DEAN HERRING		

ORDER

This cause is now before the court on defendant Bennie Dean Herring's motion for bond and release pending appeal. For the following reasons, this motion is due to be granted.

The Bail Reform Act of 1984, 18 U.S.C.A. Section 3143, the court presumes that detention is valid despite the pending appeal, and the defendant bears the burden of overcoming that presumption and proving

that release is appropriate. Morison v. United States, 486 U.S. 1306, 108 S.Ct. 1837 (Rehnquist, Circuit Justice 1988) (release pending certiorari petition); United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (per curiam), cert. denied, 479 U.S. 1018, 107 S.Ct. 669 (1986) (release pending appeal). In order to grant a defendant's motion for release pending appeal, the district court must make the following findings:

(1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released;

(2) that the appeal is not for purpose of delay;

(3) that the appeal raises a substantial question of law or fact; and

(4) that if that substantial question

> is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

Giancola, 754 F.2d at 901.* The burden of proving these findings lies with the defendant. Id.

The court heard oral argument on Herring's motion at a hearing held on May 1, 1991. Upon consideration of the record in this case, the court finds that Herring is neither likely to flee pending appeal, nor does he pose any danger to the safety of any other person or the community if released. The court also finds that Herring's appeal is not for the purpose of delay.

As to the third factor, the Eleventh Circuit has defined a substantial question for purposes of section 3143 in the following manner.

> [A] "substantial question" is one of more substance than would be necessary to a finding that it was not frivolous. It is a "close" question or one that very well could be decided the other way. Further, there are no blanket categories for what questions do or do not constitute "substantial" ones. Whether a question is "substantial" must be determined on a case-by-case basis.

Id. See generally United States v. Hicks, 611 F. Supp. 497, 499 & nn. 2,3 (S.D. Fla. 1985) (discussing the Giancola standard).

---

* In the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, section 7091, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 4181, 4410 (Stat. Supp. Feb. 1989), Congress amended section 3143 to apply as well to substantial questions on appeal likely to

result in no imprisonment or in a reduction of the defendant's sentence below the amount of time already served in custody.

page 2

At this time, Herring challenges his conviction under 47 U.S.C.A. section 605(e)(4). Section 605(e)(4) is a new law, and, as a result, Herring's conviction presents a number of substantial questions of first impression. Indeed, in resolving pretrial and trial matters, the court found little or no case law for guidance. The court is, therefore, of the opinion that this case presents substantial and novel questions of law that, if resolved in Herring's favor, may be likely to result in a reversal of his conviction or an order of a new trial. Under these specific circumstances, and in light of the court's findings, release pending appeal is justified.

Accordingly, it is ORDERED that

defendant Bennie Dean Herring's motion for release pending appeal, filed on April 24, 1991, be and it is hereby granted.

It is further ORDERED the defendant Herring's release is under the same bond and conditions imposed by the United States Magistrate on October 12, 1990, as amended by this court on February 6, 1991.

Myron Thompson

United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7377

D.C. Docket No. CR90-252

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENNIE DEAN HERRING,

Defendant-Appellant.

Appeal from the United States

District Court

for the Middle District of Alabama

(June 2, 1993)

Before ANDERSON, Circuit Judge, MORGAN and JOHNSON*, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

---

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Judgement Entered: June 2, 1993

For the Court: Miguel J. Cortez,Clerk

By: Kathleen McNabe

Deputy Clerk

ISSUED AS MANDATE: Aug. 9, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7377

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENNIE DEAN HERRING,

Defendant-Appellant.

On Appeal from the United States

District Court for the

Middle District of Alabama

ON PETITION(S) FOR REHEARING AND

SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, Circuit Judge, MORGAN and JOHNSON*, Senior Circuit Judges.

PER CURIAM:

(X) The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The petition(s) for Rehearing are Denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THIS COURT

Judge L. Anderson

UNITED STATES CIRCUIT JUDGE

ORD-42

(9/91)